

DE 00-039

NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC.

**Request for Approval of Transition and Default Service
Contract**

Order on Motion for Confidential Treatment

O R D E R N O. 23,586

November 7, 2000

On May 1, 2000, the New Hampshire Public Utilities Commission (Commission) issued its final order (No. 23,449) on the merits of this docket, approving a Settlement Stipulation concerning transition and default service for customers of the New Hampshire Electric Cooperative (NHEC or the Cooperative) covering the period between June 1, 2000 and May 31, 2001. Thereafter, on September 15, 2000 (Order No. 23,555), the Commission approved *nisi* NHEC's further request to increase its Transition and Default Service rates by an average of 2.9 percent to reflect Installed Capacity costs. The *nisi* period having expired, the only matter remaining for consideration in this docket is a motion by NHEC seeking confidential treatment of its wholesale transition and default service contracts. The Commission has received no memoranda or other filings in opposition to the motion.

The New Hampshire Right-to-Know Law provides each citizen with the right to inspect all public records in

the possession of the Commission. See RSA 91-A:4, I. The statute contains an exception, invoked here, for "confidential, commercial or financial information." RSA 91-A:5, IV. In *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997), the New Hampshire Supreme Court provided a framework for analyzing requests to employ this exception to shield from public disclosure documents that would otherwise be deemed public records. There must be a determination of whether the information is confidential, commercial or financial information "and whether disclosure would constitute an invasion of privacy." *Id.* at 552 (emphasis in original, citations omitted). "An expansive construction of these terms must be avoided," lest the exemption "swallow the rule." *Id.* at 552-53 (citations omitted). "Furthermore, the asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, . . . since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." *Id.* at 553 (citations omitted).

Our applicable rule is designed to facilitate the employment of this balancing test. We require a motion for

confidentiality to contain (1) the specific documents or portions thereof for which confidential treatment is sought, (2) reference to statutory or common law authority favoring confidentiality, (3) "[f]acts describing the benefits of non-disclosure to the public, including evidence of harm that would result from disclosure to be weighed against the benefits of disclosure to the public," and certain evidence. Puc 204.06(b). The evidence must go to the issue of whether the information "would likely create a competitive disadvantage for the petitioner." *Id.* at (c).

In support of its motion, NHEC points out that the contracts for which it seeks confidential treatment were negotiated following its formal Request for Proposals providing that confidential or proprietary information received by NHEC would be treated as confidential by NHEC to the extent allowed by applicable law. According to NHEC, a "robust, competitive response" to the Request for Proposals "could only be achieved if potential wholesale suppliers were confident that their proposals for power supply structure and pricing remained confidential and did not become available, either directly or indirectly, to their competitors." NHEC Motion for Protective Order at 2.

NHEC further avers that, during the course of

negotiations, all potential suppliers insisted on confidentiality provisions that protected, to the greatest extent possible, the terms, conditions and pricing they were offering to NHEC. According to NHEC, its experience with two Requests for Proposals in the region's wholesale electric marketplace suggests it would be impossible to obtain the least cost wholesale power, under the most advantageous terms and conditions, without providing current and future suppliers with "reliable assurance that the information they deem confidential will not be disclosed either directly or indirectly to their competitors, or to others seeking to make similar purchases in the marketplace."

According to NHEC, its request meets the balancing test articulated in the *Union Leader* case because the Cooperative's overall wholesale power costs, both cumulatively and on a month-by-month basis, will remain matters of public record, thus providing the public with adequate information to assess the basis for the transition and default service rates approved by the Commission. This reasoning is persuasive. The terms that wholesale energy providers offer to unregulated retail sellers in the restructured electric industry are obviously not subject to public disclosure, and it would ultimately cause an undue disadvantage to customers taking

transition or default service if their utility's bargaining for such service were compromised by forcing public disclosure of the terms bargained for with wholesale suppliers. As NHEC notes, the wholesale power cost information that will remain public is sufficient to allow for comparing the cost of NHEC's wholesale purchases to those of other utilities also providing transition and default service. Thus, in the absence of any countervailing arguments from other parties, we conclude that the public's interest in disclosure of the contracts is outweighed by the confidential and commercial interests at issue.

Based upon the foregoing, it is hereby

ORDERED that the motion for confidential treatment of New Hampshire Electric Cooperative, Inc. wholesale transition and default service contracts is GRANTED; and it is

FURTHER ORDERED, that this Order is subject to the ongoing authority of the Commission, on its own motion or on the motion of Staff or any party or any other member of the public to reconsider this Order in light of RSA 91-A, should circumstances so warrant.

By order of the Public Utilities Commission of New
Hampshire this seventh day of November, 2000.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary